

Appeal No. 2004AP803-CR

Cir. Ct. No. 1998CF29

**WISCONSIN COURT OF APPEALS
DISTRICT II**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JOHN W. CAMPBELL,

DEFENDANT-APPELLANT.

FILED

May 4, 2005

Cornelia G. Clark
Clerk of Supreme Court

CERTIFICATION BY WISCONSIN COURT OF APPEALS

Before Anderson, P.J., Nettesheim and Snyder, JJ.

Pursuant to WIS. STAT. RULE 809.61 (2003-04)¹ this court certifies the appeal in this case to the Wisconsin Supreme Court for its review and determination.

ISSUES

Is the holding in *State v. Bouzek*, 168 Wis. 2d 642, 484 N.W.2d 362 (Ct. App. 1992), correct in recognizing a fraud exception to the general rule which bars a collateral attack against an order or judgment of another judicial body in the

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

context of a criminal proceeding? If *Bouzek* does correctly state the law: (1) is the fraud exception properly limited to jurisdictional fraud; (2) does the “clean hands” doctrine apply; and (3) what are the respective roles of the trial court and the jury when addressing a fraud exception?

BACKGROUND

John W. Campbell appeals from judgments of conviction for bail jumping and interference with Denise James’s legal custody of Cody.² Campbell additionally appeals from a postconviction order denying his requests for a new trial and vacation of a condition of probation requiring that he reimburse Walworth County for the costs of his “standby counsel.”

The relevant facts are not in dispute. In September 1997, Denise petitioned for a divorce from Campbell in Walworth County Case No. 1997FA457. The petition states that Cody had “been born to or adopted by the parties to this marriage.” Although the petition does not so state, Vickie Prushing, not Denise, is the biological mother of Cody. Denise had adopted Cody in an earlier adoption proceeding in Missouri.³ The fraud at issue in this case originated in that Missouri adoption proceeding. On September 22, 1997, the family court commissioner entered a temporary order granting Denise legal custody and primary physical placement of Cody.

² Campbell was also convicted of interference with the custody of another child, Randy. Campbell does not appeal from this conviction.

³ Denise had earlier adopted the other child, Randy, in a prior adoption proceeding in Kansas. As noted, Campbell does not appeal the conviction regarding Randy’s custody. However, the parties dispute whether Campbell’s fraud defense, if permitted, would have any impact on his bail jumping conviction.

On October 14, 1997, Campbell filed a Motion and Affidavit for Temporary Order in the divorce proceeding requesting joint legal custody and equal physical placement of Cody. Campbell alleged in his supporting affidavit that Denise “had knowledge that under Missouri state law that the adoption of the minor child Cody would not be valid. In that said adoption did not meet [WIS. STAT. §] 48.97 adoption order of other jurisdictions.” Campbell’s affidavit was based on his claim that Denise’s adoption of Cody was never validly finalized because Campbell and Denise had moved from Missouri to Wisconsin with Cody prior to the finalization of the adoption in Missouri. In order to avoid the residency problem, Denise allegedly used the Missouri address of their lawyer to complete the adoption.

On December 23, 1997, following a hearing, the family court commissioner entered an order granting Campbell alternating weekend placement but maintaining legal custody and primary physical placement with Denise. On Sunday, February 1, 1998, Campbell failed to comply with the order requiring that he return Cody to Denise by 6:00 p.m. Instead, Campbell took Cody to Mexico along with Prushing, the biological mother.⁴ At this time, Campbell was subject to the terms of a release on bond in a pending Walworth county criminal case requiring, in part, that he commit no crimes or engage in criminal activity. As a result, the State filed a criminal complaint against Campbell alleging interference with Denise’s legal custody of Cody and one count of felony bail jumping based on that alleged interference.

⁴ Campbell also took Randy to Mexico. Hence the further charge of interference with Randy’s custody.

On February 8, 1998, Prushing returned with Cody to Texas where she was arrested, and Cody was returned to Denise. Campbell was eventually arrested in California in January 2001 and returned to Wisconsin to answer to the charges.

Campbell represented himself during the criminal proceedings. However, he was assisted by “standby counsel” appointed by the trial court. At his preliminary hearing, Campbell sought to cross-examine Denise as to her knowledge that the adoption of Cody was fraudulent. However, the trial court barred this line of questioning, ruling that Campbell needed to introduce other evidence of this contention at trial. The court found probable cause and bound Campbell over for trial.

Prior to trial, the State moved in limine for a ruling that would bar Campbell from collaterally attacking the validity of the temporary order in the divorce action based upon Campbell’s claim that Denise had fraudulently obtained Cody’s adoption in Missouri.⁵ At the hearing on the motion, the State provided the following background information regarding this issue. In the divorce case, Campbell had challenged Cody’s adoption on the grounds that Denise had committed fraud on the Missouri adoption court.⁶ The family court had refused to address Campbell’s challenge on the merits, instead ruling that Campbell would have to challenge the adoption in the Missouri court. After the divorce, Campbell resurrected the issue, seeking a de novo hearing. The family court agreed to

⁵ In addition, the State contended that Campbell’s argument was barred by issue preclusion. The State does not renew this argument on appeal.

⁶ The record in the divorce proceeding, case no. 1997FA457, has been included in the record on appeal.

conduct a hearing on Campbell's motion, but the hearing never occurred because Campbell took Cody to Mexico. The divorce judgment awarded Cody's legal custody and primary physical placement to Denise.

After hearing arguments on the State's motion in limine, the trial court granted the State's request and precluded Campbell from collaterally attacking the family court's prior grant of Cody's custody to Denise. Campbell then made an offer of proof on the question. He produced several documents, including the Missouri adoption decree and a voter registration poll list, which indicated that Campbell and Denise were residing in Wisconsin when Cody's adoption was finalized in Missouri. On October 4, 2001, the trial court entered a written order precluding Campbell from raising the legality of Cody's adoption in the criminal proceeding. The order stated, "Mr. Campbell cannot attack the prior decision of the court granting legal custody to [Denise] within the context of these proceedings."

The matter proceeded to a five-day jury trial at which "stand-by counsel" continued to assist Campbell. The jury found Campbell guilty of interfering with Denise's custody of Cody and of bail jumping. The court sentenced Campbell to five-years in prison on the bail jumping conviction, withheld sentence on the interference with custody charge and placed Campbell on a thirteen-year consecutive period of probation.⁷ As a condition of probation, the court ordered that Campbell reimburse Walworth County for the costs of his "standby counsel."

⁷ The conviction for Campbell's interference with the custody of Randy also resulted in a similar grant of probation.

On October 8, 2003, Campbell, now represented by advocacy counsel, filed a motion for postconviction relief alleging that the trial court had erred by barring his attempted collateral attack on the custody provision in the prior divorce judgment. Campbell argued that this infringed on his constitutional right to present a defense regarding the “custody” element of the interference with custody charge. In support, Campbell cited to *Bouzek*, 168 Wis. 2d at 645, for the proposition that while a prior court order in a separate proceeding generally is not subject to collateral attack, such an order is subject to collateral attack if the order was obtained by fraud. The trial court denied Campbell’s motion. Campbell additionally challenged the condition of probation requiring him to reimburse Walworth County for the costs of his appointed “standby counsel.” The court also denied this challenge.

Campbell appeals from the judgments of conviction for the interference with Cody’s custody and bail jumping. He also appeals from the postconviction order requiring that he pay the costs of his “standby” counsel as a condition of probation.

DISCUSSION

The principal issue we certify is whether a defendant in a criminal case may collaterally attack a court order of another judicial body if the defendant is able to demonstrate that the judgment was procured by fraud. Campbell

contends that barring such a collateral attack violates his constitutional right to present a defense.⁸

The trial court's ruling barring a collateral attack was premised on Campbell's failure to pursue the validity of the adoption proceedings in the posttrial proceeding in the divorce action. As noted earlier, although Campbell filed a posttrial motion in the divorce action for a de novo hearing on this issue, he never pursued the matter because he absconded to Mexico with Cody. Nonetheless, Campbell contends that the trial court's decision violated his constitutional right to present a defense to the "custody" element of the crime of interference with child custody.⁹ We further note that although Campbell did not

⁸ We do not certify Campbell's further issue which raises the question of whether a convicted defendant may be required as a condition of probation to reimburse the county for the costs of "standby counsel." However, we do observe that this issue presents a question of first impression which may well invite supreme court review.

⁹ The elements of interference with the custody of a child under WIS. STAT. § 948.31(1)(b) are as follows:

The first element requires that on (date of alleged offense), (name of child) had not attained the age of 18 years.

The second element requires that (name of custodian) had legal custody of (name of child) under a (court order) (judgment) in an action for divorce.

The third element requires that the defendant took away (name of child) from (name of custodian) without the consent of (name of custodian).

....

The fourth element requires that the defendant acted intentionally.

....

(continued)

pursue his posttrial renewal of the issue, he did previously raise the issue during the divorce proceeding.

Campbell asserts fraud by Denise on two levels. First, he contends that Denise committed fraud in the Missouri adoption proceeding by falsely representing her residency in that state. Thus, according to Campbell, the Missouri adoption order was of no legal effect, and Denise's subsequent representation to the Walworth county family court that she was Cody's adoptive mother was the second level of fraud. Because Denise utilized these frauds to obtain Cody's legal custody and because "custody" is an element of the crime charged against him, Campbell argues that he should have been allowed to collaterally attack the custody order. Campbell concedes that a court order in a prior proceeding generally is not subject to collateral attack. However, he cites to the court of appeals decision in *Bouzek* for the proposition that a judgment procured by fraud presents an exception to the general rule.

In *Bouzek*, this court held that a person convicted of violating a harassment injunction may not collaterally attack the validity of the underlying injunction in a subsequent criminal proceeding for its violation. *Bouzek*, 168 Wis. 2d at 643. There, the defendant had consented to the issuance of the original injunction. *Id.* However, after pleading guilty to violating the injunction, the defendant filed a motion for postconviction relief on grounds that the underlying

The fifth element requires that the defendant took away (name of child) with intent to deprive (name of custodian) of custody rights.

WIS JI—CRIMINAL 2166 (footnotes omitted). Campbell's attack is aimed at the second element of the offense.

injunction was overly broad and had been improperly issued. *Id.* The court declined to reach the merits of the arguments because they constituted an impermissible collateral attack on the injunction. *Id.* at 644. The court cited the following language from its previous decision in *Schramek v. Bohren*, 145 Wis. 2d 695, 713, 429 N.W.2d 501 (Ct. App. 1988):

A collateral attack is an “attempt to avoid, evade or deny the force and effect of a judgment in an indirect manner and not in a direct proceeding prescribed by law and instituted for the purpose of vacating, reviewing, or annulling it.” ... For [plaintiff] to ... request consideration in separate proceedings of any cause of action [based on the invalidity of the domestic abuse injunction] would be sanctioning a collateral attack on the order of another [judicial body. *[Her] only basis for [an] attack [on the injunction would be] if she had demonstrated fraud in the procurement of the injunctive order.*

Bouzek, 168 Wis. 2d at 644 (alterations in original; emphases added). Campbell seizes on the court’s observation that the defendant would have had a basis for a collateral attack, if he “had demonstrated fraud in the procurement of the injunctive order.” *See id.* Armed with the court’s language in *Bouzek* and *Schramek*, Campbell contends that the trial court erred in denying him the right to collaterally attack the family court’s custody orders, thereby violating his constitutional right to present a defense.

The State correctly counters that neither *Bouzek* nor *Schramek* actually involved a claim of fraud.¹⁰ The State therefore argues that the language

¹⁰ Likewise, there was no claim of fraud in *Zrimsek v. American Automobile Insurance Co.*, 8 Wis. 2d 1, 3, 98 N.W.2d 383 (1959), which set forth the general law of collateral attack in the civil context:

(continued)

might well be dicta. More to the point, the State contends that only jurisdictional fraud is subject to collateral attack and, again, neither *Bouzek* nor *Schramek* spoke to this finer distinction. In support, the State cites to our decision in *State v. Jankowski*, 173 Wis. 2d 522, 528, 496 N.W.2d 215 (Ct. App. 1992), for the proposition that an order issued without subject matter or personal jurisdiction is void and may be attacked directly or collaterally at any time. *Id.* Because Campbell’s proffered fraud evidence did not defeat the jurisdictional soundness of the custody and placement orders, the State argues that Denise had “legal custody” of the children at the time of Campbell’s violation of the order and, therefore, the fraud evidence was irrelevant to Campbell’s constitutional right to present a defense.

The State additionally contends that insofar as Campbell’s argument derives from equitable principles, it is subject to the “clean hands” doctrine. The State cites to *Lake Bluff Housing Partners v. City of South Milwaukee*, 2001 WI App 150, ¶13, 246 Wis. 2d 785, 632 N.W.2d 485, for the proposition that a party alleging fraud should be denied relief when, “the things from which the plaintiff seeks relief are the fruit of *its own* wrongful or unlawful course of conduct.” (Citation omitted.) Because Campbell was complicit in Denise’s allegedly fraudulent representation in the Missouri adoption, the State argues that he cannot

A judgment rendered by a court having jurisdiction of the parties and the subject matter, unless reversed or annulled in some proper proceeding, is not open to contradiction or impeachment, in respect of its validity, verity, or binding effect, by parties or privies, in any collateral action or proceeding, *except . . . for fraud in its procurement.*

(Citation omitted; emphasis added.) (The court observed, “The judgment carries the presumption of validity; appellant shows no fraud in its procurement.”)

now challenge Denise's procurement of the custody order. Campbell responds that the only relevant fraud was that committed by Denise upon the Walworth county family court when Denise represented that she was Cody's adoptive mother. Since Campbell was not complicit in this fraud (to the contrary, he brought it to the family court's attention), Campbell reasons that the clean hands doctrine should not apply.

In certifying this case, we recognize that *Bouzek* and *Schramek* identify a fraud exception to the general bar on collateral attacks. However, neither case was fraud based. Thus, other than making the bald statement, neither opinion was required to further develop the law surrounding the fraud exception to collateral attack. Moreover, there are no supreme court cases that have addressed this issue. At oral argument, the State requested this court to consider certifying this case to the supreme court to clarify the court of appeals case law on this topic.

We further note that the constitutional right to present a defense, while not absolute, may, in some instances, trump the rules of evidence. *See State v. Pulizzano*, 155 Wis. 2d 633, 646, 648, 456 N.W.2d 325 (1990). We recognize that the rule barring collateral attack is a rule of procedure, not evidence. Nonetheless, we inquire of the supreme court whether the same logic might apply in the appropriate case and, if so, whether this is such a case.

Moreover, even assuming that *Bouzek* is correct in limiting collateral attack to instances of fraud, this case still presents several unanswered and troubling questions regarding the threshold standards for mounting a collateral attack based on the fraud exception and the procedure relating to such an attack. For example, would such an exception apply to any kind of fraud or, as the State contends, only to fraud relating to the court's jurisdiction as *Jankowski* implies?

Should the defendant's complicity in the fraud be considered or possibly defeat the exception? If so, does the trial court make this determination on a threshold basis as a matter of law, or is the defendant entitled to a jury determination on the question based on the right to present a defense? Does the recognition of a fraud-based exception risk converting a criminal trial into a secondary trial on subissues regarding fraud, clean hands and related issues? We believe that these new and important questions are best addressed by the supreme court.

We respectfully request that the supreme court accept jurisdiction over this appeal in order to provide guidance on these questions.

